Petitioners were fined a total of $12,000—*i.e.*, $1,000 (the minimum statutory fine) on each count. The court of appeals affirmed without oral argument (Pet. App. 1-2).

1. The evidence showed that petitioner Finberg was the manager of petitioner Top Shippers Association, Inc., a non-profit shipper's cooperative of some 200 members who were primarily located in the Dallas, Texas area; they had organized the cooperative to obtain the advantages of consolidated shipping of freight (A. 8-11). Shipments ordered by member retailers were received in New York by Rex Consolidation Agency where it consolidated the shipments to its various clients, including Top Shippers (A. 8, 52-53).

The procedure was for the suppliers to ship the merchandise to Rex in sealed cartons accompanied by bills of lading listing the quantity, weight and description of the merchandise (A. 52-58). After consolidating the cartons in a rail boxcar, Rex would deliver the sealed boxcar to the railroad with a shipping manifest it prepared; this manifest listed the quantity, weight and description of the boxcar's contents and its destination (A. 52-59). The railroad's charges to Top Shippers were based on the published, approved tariffs of the railroad as computed from the information contained on the shipping manifest (A. 175-177). The custom was for Top Shippers to receive a copy of the manifest and other shipping papers by mail from Rex about three days before the arrival of the boxcars (A. 15-18, 58-59). Top Shippers would then prepare an invoice to be forwarded to each retail member for its particular shipment; this

invoice would list the charge to that member based on Top Shippers' own rate schedule (A. 18-22). The merchandise was then delivered to the retailer by Top Shippers' affiliate, Top Truckers (A. 22-23).

On twelve separate occasions, during February, March and April of 1967, shipments for Dallas retailer Rhealee, consisting primarily of hats, were received by Rex for consolidation and shipment from New York (A. 146-158, 163-169). Consistent with the practice established at the request of Mr. Finberg of Top Shippers in 1965, Rex listed these shipments as "scarves" or "cotton braid" (A. 80-82, 84-87, 108-110, 132-135). The approved tariff for scarves or cotton braid was $2.75 per hundred pounds; the tariff for hats was $6.62 per hundred pounds, and for "nested" hats, $5.63 (A. 176-183). The total undercharge, or concession, due to the misrepresentation of the twelve shipments was approximately $1,046.92 (A. 186-195). The charge by Top Shippers to members was the same for either hats or cotton braids or scarves—$4.80 per hundred pounds (A. 238). The freight bills, prepared by Top Shippers and submitted to its client in each of these twelve instances, showed the shipments to be hats. These freight bills were prepared from the shipping manifests received from Rex; in each case, petitioner Finberg changed the shipping manifests by crossing out "scarves" or "cotton braid" and inserting "hats" (A. 18-20, 36, 38-39).

2. Petitioners contend that there was a fatal variance between the indictment and the trial court's in-

structions. Count 1 is representative; it alleges in pertinent part:

> "That on or about March 3rd, 1967, at Dallas, Texas * * * Top Shippers * * * and its manager, Francis A. Finberg, and each of them did knowingly by means of a device, solicit, accept and receive and cause to be solicited, accepted and received from the St. Louis Southwestern Railway Company, a common carrier, by railroad engaged in Interstate Commerce for hire, a concession * * * in respect to the transportation by said common carrier railroad * * * where the shipment was delivered to Top Shippers Association, Inc., the consignee, whereby said property was transported at a rate less than charged * * * in the tariffs * * * by the device [of defendants] of falsely representing on the shipping documents that a portion of the consolidated shipment consisted of cotton braids or cotton scarfs and paying lower transportation charges based on such description * * * (A. 301-302).

Petitioners urge that the indictment as thus written required the government to prove that they "solicited" rebates [2] but that the court instructed the jury that it could convict simply on a finding of knowing receipt or acceptance of the rebate. (A. 305-306, 308-309). In this connection, petitioners rely upon a post-verdict affidavit of the jury foreman that he would have voted to acquit had the court's charge made solicitation an essential element of the offense (Pet. 18-19; Pet. App. V).

---

[2] There is no claim as we read the petition that the government failed in this proof.

This contention was summarily rejected by the court below and warrants no further review.[3] It is bottomed on a hyper-technical and questionable construction of the indictment and is at odds with the plain intent of the statutory scheme.

The purpose of the Elkins Act is to eliminate all rebates on property transported by a common carrier in interstate commerce; to achieve its broad aim the statute prohibits solicitation, acceptance or receipt of a concession less than the published rates as separate offenses. The Act reflects the considered congressional judgment to "make certain that once a tariff had been published, no deviations whatever from that tariff would take place." Its prohibitions are not limited "to only some kinds of rebates or to only some people." *United States* v. *Braverman*, 373 U. S. 405, 408. This is not a case like *Stirone* v. *United States*, 361 U. S. 212, where the defendant was convicted of a crime not charged in the indictment. Petitioners were fully apprised of the charges against them, which clearly included improper receipt of rebates. The government's evidence sustained those charges and no further prosecution for any of these acts is permissible. See, *e.g.*, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 83.

---

[3] The panel placed this case on summary calendar and dispensed with oral argument. This procedure, which the Fifth Circuit has instituted to deal with insubstantial claims, does no violence to the requirements of due process. See *Payton et ux* v. *United States*, 425 F. 2d 1324 (C.A. 5), certiorari denied, 400 U.S. 957. We are providing counsel with a copy of our brief in opposition in *Payton* (No. 713, this Term).

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 428131 720